

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ALVINO GUARDIOLA-HERNANDEZ,

Petitioner(s),

v.

NEIL CLARK, et al.,

Respondent(s).

NO. C06-1707P

ORDER ON REPORT AND
RECOMMENDATION

The above-entitled Court, having received and reviewed:

1. Report and Recommendation (Dkt. No. 5)
2. Petitioner's Opposition to Magistrate's Report and Recommendation (Dkt. No. 6)

and all exhibits and declarations attached thereto, makes the following ruling:

IT IS HEREBY ORDERED that Petitioner's Petition for Writ of Habeas Corpus, Motion for Emergency Stay and Motion for Alternate Relief of Audita Querela are DISMISSED with prejudice.

On November 24, 2006, Petitioner Alvino Guardiola-Hernandez filed a "Petition for Writ of Habeas Corpus and Motion for Emergency Stay Pending the Mandate of the Court, Motion for Alternate Relief of Audita Querela," challenging his final order of removal entered by the Board of Immigration Appeals on November 2, 2006. The Court lacks subject matter jurisdiction to hear the habeas petition or motion for stay – the REAL ID Act (8 U.S.C. § 1101(a)(43)(A)) clearly provides that the exclusive means of asserting a challenge to a final order of removal is to file a Petition for Review with the appropriate court of appeals.¹ Lacking subject matter jurisdiction, this Court shall order the habeas petition and motion for stay dismissed with prejudice.

¹ In fact, Petitioner has already filed a Petition for Review in the Ninth Circuit Court of Appeals and received a stay of removal pursuant to Ninth Circuit General Order 6.4(c)(1)(3). See Court of Appeals Docket # 06-7544.

1 In his habeas petition, Petitioner argues that he suffered from ineffective assistance of counsel
2 by virtue of his attorney's decision to admit that petitioner's conviction for delivery of a controlled
3 substance in violation of Oregon Revised Statute § 475.992(1)(b) qualified as an aggravated felony
4 and rendered him ineligible for either asylum or cancellation of removal. In his Opposition to
5 Magistrate's Report and Recommendation, Petitioner argues "that the District court can, on
6 independent motion, relieve the Petitioner of the consequences of his conviction without altering the
7 conviction or the deportation order." Opposition, p. 1.

8 Petitioner cites no authority for this proposition, nor does it have any logical or intuitive
9 appeal. Petitioner is not, in this proceeding, seeking to be relieved of "the consequences of his
10 conviction" so much as to be relieved of the consequences of his attorney's admission regarding his
11 conviction in his removal proceeding. The REAL ID Act is unequivocal that any such matter must be
12 brought before the appropriate court of appeals (as Petitioner has done); this Court has no jurisdiction
13 over the matter.

14 **Conclusion**

15 Lacking subject matter jurisdiction over Petitioner's matter, this Court orders his petition for
16 habeas corpus and all related pleadings to be DISMISSED with prejudice.

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18 The clerk is directed to provide copies of this order to all counsel of record.

19 Dated: January __17__, 2007

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22 Marsha J. Pechman
23 U.S. District Judge
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